

³ The Board notes that following the November 18, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether OWCP properly determined that appellant had abandoned his request for an oral hearing before a representative of OWCP's Branch of Hearings and Review; and (2) whether appellant has met his burden of proof to establish that he was disabled from work commencing September 15, 2020 causally related to his accepted employment injury.

FACTUAL HISTORY

On January 30, 2020 appellant, then a 45-year-old forklift operator, filed an occupational disease claim (Form CA-2) alleging that he sustained an aggravation of a low back injury causally related to factors of his federal employment. He noted that he first became aware of his condition on July 1, 2002 and realized that it was caused or aggravated by his federal employment on October 31, 2019. Appellant advised that he had experienced increased back pain over the years, but that on October 31, 2019, while operating a forklift at work, his pain had increased such that he had to seek medical treatment. He stopped work on October 31, 2019. OWCP accepted the claim for lumbar intervertebral disc disorders with radiculopathy and unspecified complications of medical care. Appellant underwent a left L4-5 microdiscectomy on February 6, 2020. OWCP paid him wage-loss compensation from February 6 to March 18, 2020. Appellant returned to his usual employment on March 19, 2020.

In a statement dated February 5, 2020, appellant attributed the aggravation of his low back condition to his work duties from December 2017 to October 31, 2019, the date he stopped work due to pain. He described the work duties over this period that he believed had contributed to his condition.

On April 16, 2020 subsequent to its acceptance of the claim, OWCP determined that appellant's claim was for a traumatic injury rather than an occupational disease, noting that he had experienced left leg pain on October 31, 2019. It converted the claim to a traumatic injury claim.

By decision dated May 28, 2020, OWCP found that appellant was not entitled to continuation of pay (COP) from October 31 to December 15, 2018 as he had not reported his injury on an OWCP-approved form within 30 days following the October 31, 2019 employment incident.

On June 2, 2020 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In a July 14, 2020 notice letter, OWCP's hearing representative informed appellant that a telephonic hearing was scheduled for September 14, 2020 at 11:15 a.m., Eastern Standard Time (EST). The notice provided a toll-free number and the required passcode to participate in the telephonic hearing. OWCP's hearing representative instructed appellant to call the toll-free number provided and enter the passcode when prompted. The letter was mailed to his last known address of record.

Appellant did not call for the scheduled hearing and there is no indication that he requested postponement.

By decision dated September 29, 2020, OWCP's hearing representative found that appellant had abandoned his request for an oral hearing with regard to the denial of COP. The hearing representative found that he had failed to appear at the telephonic hearing scheduled for September 14, 2020 and had failed to contact OWCP either before or after the scheduled hearing to request a postponement or explain his failure to appear.

In a report dated September 10, 2020, a nurse practitioner noted that appellant had worked for four weeks, but left work two weeks ago due to pain and planned to file for medical retirement.

On October 6, 2020 appellant filed a claim for compensation (Form CA-7) for disability from work for the period September 15 to 25, 2020. He continued to file CA-7 forms requesting wage-loss compensation from September 29 to October 9, 2020, October 13 to 30, 2020, and November 3 to 17, 2020.

In a development letter dated October 9, 2020, OWCP requested that appellant submit evidence supporting disability from employment for the claimed period. It afforded him 30 days to submit the necessary evidence.

Subsequently, OWCP received a return to work note dated September 10, 2020 from a nurse practitioner, who indicated that appellant had been seen on September 10, 2020 and that he could resume work on October 10, 2020.

On October 12, 2020 a nurse practitioner indicated that appellant had been seen on October 12, 2020 and could return to work on November 13, 2020.

By decision dated November 18, 2020, OWCP denied appellant's claim for wage-loss compensation beginning September 15, 2020 causally related to his accepted employment injury.

LEGAL PRECEDENT -- ISSUE 1

A claimant who has received a final adverse decision by OWCP may obtain a hearing by writing to the address specified in the decision within 30 days of the date of the decision for which a hearing is sought.⁴ Unless otherwise directed in writing by the claimant, OWCP's hearing representative will mail a notice of the time and place of the hearing to the claimant and any representative at least 30 days before the scheduled date.⁵ OWCP has the burden of proof to establish that it properly mailed to a claimant and any representative of record a notice of a scheduled hearing.⁶

A claimant who fails to appear at a scheduled hearing may request in writing, within 10 days after the date set for the hearing, that another hearing be scheduled. Where good cause for failure to appear is shown, another hearing will be scheduled and conducted by teleconference.

⁴ 20 C.F.R. § 10.616(a).

⁵ *Id.* at § 10.617(b).

⁶ *T.R.*, Docket No. 19-1952 (issued April 24, 2020); *M.R.*, Docket No. 18-1643 (issued March 1, 2019); *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

The failure of the claimant to request another hearing within 10 days, or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant abandoned his request for an oral hearing before an OWCP hearing representative.

Following OWCP's May 28, 2020 decision concerning the denial of COP, appellant filed a timely request for an oral hearing before a representative of OWCP's Branch of Hearings and Review. In a July 14, 2020 letter, OWCP's hearing representative notified appellant that a telephonic hearing was scheduled for September 14, 2020 at 11:15 a.m., EST. The hearing representative properly mailed the hearing notice to appellant's last known address of record⁸ and provided him with a toll-free number and a pass code to use at the time of the scheduled hearing. There is no evidence of nondelivery of the hearing notice. Appellant, however, failed to appear for the scheduled hearing and he did not request a postponement or provide an explanation to OWCP for his failure to attend the hearing within 10 days of the scheduled hearing.⁹ The Board thus finds that OWCP properly determined that appellant abandoned his request for an oral hearing.¹⁰

On appeal appellant asserts that he telephoned for the scheduled hearing twice on September 14, 2020 and waited on the line over 30 minutes each time. He telephoned OWCP the following day and the call did not go through. Appellant, however, has provided no evidence supporting his assertion. The record establishes that OWCP mailed the hearing notice to his address with instructions on how to participate; however, he failed to appear for the scheduled hearing.

LEGAL PRECEDENT -- ISSUE 2

An employee seeking benefits under FECA¹¹ has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.¹² For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.¹³ Whether a particular injury causes an employee

⁷ 20 C.F.R. § 10.622(f); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(g) (September 2020); A.J., Docket No. 18-0830 (issued January 10, 2019).

⁸ R.J., Docket No. 18-1701 (issued May 18, 2020); E.S., Docket No. 19-0567 (issued August 5, 2019).

⁹ R.J., *id.*; A.J., Docket No. 18-0830 (issued January 10, 2019).

¹⁰ E.M., Docket No. 20-0837 (issued January 27, 2021).

¹¹ *Supra* note 2.

¹² *See* T.A., Docket No. 18-0431 (issued November 7, 2018).

¹³ M.C., Docket No. 18-0919 (issued October 18, 2018).

to become disabled for work, and the duration of that disability, are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.¹⁴

Under FECA the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.¹⁵ Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.¹⁶ An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages that he or she was receiving at the time of injury, has no disability as that term is used in FECA.¹⁷

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify their disability and entitlement to compensation.¹⁸

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met his burden of proof to establish that he was disabled from work commencing September 15, 2020 causally related to his accepted employment injury.

Appellant filed CA-7 forms requesting wage-loss compensation due to disability from employment beginning September 15, 2020. In support of his claim for disability, he submitted reports dated September 10 and October 12, 2020 signed solely by a nurse practitioner. However, certain healthcare providers such as physical therapists, nurses, physician assistants, and social workers are not considered physicians as defined under FECA.¹⁹ Consequently, the medical findings and/or opinions of a nurse practitioner will not suffice for purposes of establishing entitlement to compensation benefits.²⁰

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128 and 20 C.F.R. §§ 10.605 through 10.607.

¹⁴ See *K.C.*, Docket No. 17-1612 (issued October 16, 2018).

¹⁵ 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-0412 (issued October 22, 2018).

¹⁶ See *L.W.*, Docket No. 17-1685 (issued October 9, 2018).

¹⁷ See *M.W.*, Docket No. 20-0722 (issued April 26, 2021); *D.G.*, Docket No. 18-0597 (issued October 3, 2018).

¹⁸ *A.W.*, Docket No. 18-0589 (issued May 14, 2019); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹⁹ 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t); see *B.W.*, Docket No. 20-1027 (issued November 18, 2020); *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006). A report from a physician assistant or certified nurse practitioner will be considered medical evidence if countersigned by a qualified physician. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013).

²⁰ *Id.*

CONCLUSION

The Board finds that OWCP properly determined that appellant had abandoned his request for an oral hearing before a representative of OWCP's Branch of Hearings and Review. The Board further finds that he has not met his burden of proof to establish that he was disabled from work commencing September 15, 2020 causally related to his accepted employment injury.

ORDER

IT IS HEREBY ORDERED THAT the November 18 and September 29, 2020 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 9, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board